

E. Actual EEO Policies Of The Stations

1. The Concordia Seminary Arrangement

51. Since at least 1955, the Stations have regularly hired Concordia Seminary students and their spouses. NAACP Ex. 29, p. 6 ¶¶10-11.

52. In 1990, there were three African Americans out of 482 students enrolled at Concordia Seminary. KFUE Ex. 4, Tab 7, p. 15; NAACP Ex. 30.

53. Rev. Bryant Clancy, a African American minister and member of the Synod, is the Director of the Synod's Commission on Black Ministry, a position he has held since July 1, 1990. From 1970-1982, he was Vice President of the Southeastern District of the Synod. From 1982 until July 1, 1990, he was Executive Director for Congregational Services of the Southeastern District of the Synod. KFUE Ex. 2, p. 1, ¶1. Clancy estimated that between 1983 and 1990, the approximate, average number of African American students at Concordia Seminary was five. Tr. 722-23.

54. Devantier was not aware of "any established policy that gave preference to seminary students" but acknowledged that "as a matter of practice because of the availability of seminary students and the long-standing relationship, the reality was quite a number of seminary students and spouses were employed for both part-time jobs and occasionally full-time jobs as well." Tr. 854.

55. Rev. Ralph A. Bohlmann was President of the Synod from 1981 through 1992. Bohlmann testified that he assumed that Concordia Seminary students or their spouses "would be given top consideration" even assuming the existence of other applicants of equal qualifications. Tr. 289.

56. Of the 84 persons hired during the license term, 29 (eight of the 43 fulltime hires and 21 of the 41 parttime hires) were hired pursuant to KFUD's arrangement with Concordia. KFUD Ex. 4, Tab 6. Thus, the effect of the "arrangement" was a set-aside of 35% of the Stations' jobs for an over 99% White group

57. KFUD's September 21, 1992 Motion to Strike was misleading in arguing that during the period then under review, only 15% of fulltime positions were hired through the Seminary. MMB Ex. 11, p. 20. While KFUD's math was correct (five of 31 fulltime hires during the October, 1986 - January, 1990 period under review came from the Seminary) KFUD dropped a footnote to add that some Seminary students "train as part-time announcers on KFUD-AM" without giving numbers or percentages. Id., n. 6. These were not merely traineeships, they were jobs, and were listed as jobs in KFUD's schedule of jobs. KFUD Ex. 4, Tab 6, pp. 9-15. Furthermore, during the period under review, fully 15 out of 24 (62%) of KFUD's parttime positions were filled through Concordia Seminary. Id.

58. KFUD's February 23, 1990 Opposition explained the Concordia arrangement as follows:

KFUD's studios are located on the campus of Concordia Seminary. KFUD pays no rent for these facilities. Given the noncommercial nature of the AM operation (and, until recently, of the FM as well), this arrangement is extremely important to KFUD's ability to continue to offer high quality broadcast service. Part of the arrangement has included reciprocal efforts by KFUD to provide broadcast training to Concordia students or their spouses through employment at the stations. Thus, as an accommodation to the Seminary, KFUD has tried to fill a number of the non-specialized positions at the stations with Seminary students or their spouses.

KFUD Ex. 4, Tab 7, p. 17.

59. In response to an EEO Branch Bilingual letter (MMB Ex. 5), KFUEO provided a letter of May 12, 1992 on its own stationery, signed by Stortz. MMB Ex. 6. That letter further amplified on the Concordia arrangement:

our reciprocal arrangement with the Concordia Lutheran Seminary (which provides our office and studio space rent-free) requires that we make special efforts to employ Seminary students who have obtained the required knowledge of the religious format without resort to outside recruitment sources.

Id., p. 3.

60. On September 21, 1992, in response to yet another EEO Branch Bilingual letter (MMB Ex. 9) and the NAACP's further comments (MMB Ex. 10), KFUEO filed its "Motion to Strike and Reply to Comments." MMB Ex. 11. That pleading again amplified on the Concordia "arrangement":

KFUEO's studios and offices are housed free-of-charge [at the Seminary]... The materials submitted by KFUEO in this proceeding show that, despite the incentive for maintaining a synergistic relationship with the Seminary so as to receive much-needed benefits, KFUEO recruited or hired through the Seminary for only five of 35 full-time hiring opportunities from October 1986 through January 31, 1990. (See Opposition at Table Three; Response at pp. 6-9). 6/ The remaining 85 percent of full-time job positions were recruited for and hired through a variety of other sources.

6/ In addition, KFUEO attempts to satisfy the terms of its reciprocal arrangement with the Concordia Lutheran Seminary by allowing Seminary students who are studying for a theological Lutheran career to train as part-time announcers on KFUEO-AM.

Id., p. 20.

61. KFUO abandoned its "reciprocal arrangement," "rent-free," "rent for training," and "much-needed benefits" explanation at trial. Such an explanation could not have survived judicial scrutiny, since both the Seminary and the Stations are owned by the same Synod. KFUO had admitted that "all of the employees at the KFUO stations are themselves employees of the [International] Center", which is the Synod's main headquarters. Letter to Glenn Wolfe from Marcia Cranberg, December 28, 1992, MMB Ex. 14, p. 24 n. 6; see also MMB Ex. 11, p. 12. Apparently, it did not occur to those responsible for the Opposition that anyone would think to ask whether, absent the Concordia/KFUO arrangement, the Synod would begin paying itself rent.

62. KFUO allowed Stortz as the vessel to carry the bulk of its substantive testimony about personnel policies. Stortz has been employed at the stations since 1975, serving as an engineer until 1978. He became Operations Manager from 1978 to 1991. From July, 1986 to May, 1987, he was also the Acting General Manager of both stations. Since 1991, he has held both the Director of Operations and General Manager positions. He had day-to-day responsibility for hiring and personnel practices when he was Acting General Manager (July, 1986 to May, 1987) and has had these responsibilities again since 1991. KFUO Ex. 4, p. 1, ¶¶1-2.

63. Through Stortz, KFUO abandoned its "rent-free" predesignation theory and propounded an entirely different theory: that the Concordia arrangement was really intended to supply persons to the Stations willing to work for "the low salaries that these Church Stations have been able to pay." KFUO Ex. 8, p. 4.

64. Like the "rent for employees" theory, the "cheap labor" theory was without foundation or logic. KFUD offered no evidence of what the Stations' salaries were. Nor did KFUD claim that these salaries were less than those offered elsewhere, nor that others would not have been willing to work for the same salaries. KFUD did not even know how much it paid relative to other stations in the market. Tr. 487-88 (Testimony of Dennis Stortz); Tr. 808-09 (Testimony of Paul Devantier). Indeed, KFUD pointed to not one person, of any race, who rejected employment based on salary considerations.

65. Furthermore, KFUD's "cheap labor" theory is meaningless in isolation. Low pay would presumably discourage persons of all races; money has equal value when placed in hands of any color. Thus, by invoking low salaries to defend an EEO complaint -- especially when done with no supporting evidence whatsoever -- KFUD necessarily indulged the embedded stereotype that African Americans would be more discouraged by low pay than Whites. Official notice could be taken that since 1609, African Americans have been quite accustomed to working the same jobs for lower pay than Whites. However, it is sufficient to note that the record in this case does not contain any evidence that KFUD's "low pay" theory is based on anything other than a racial stereotype.

**2. Discrimination Whose Pretext
 Is A Purported Need For Theological
 Or Classical Music Expertise**

66. KFUO maintained internal documents called "Position Guides" and "Duty Descriptions" to delineate the duties and/or qualifications expected of the occupants of particular positions. Preparing and maintaining these documents was Devantier's responsibility. "Statement of Understanding, Operating Procedures for KFUO and KFUO-FM, Proposed by Standing Committee on Broadcast, October, 1986, Approved by the Board for Communication Services, October, 1986, NAACP Ex. 33, p. 5; Tr. 860 (Testimony of Paul Devantier). These documents were posted on station bulletin boards when jobs were open. Tr. 509, 653-54, 731, 733-34 (Testimony of Dennis Stortz).

67. The exhibits in which these documents are found are discussed in Table 4. The exhibits are: NAACP Ex. 35 (undated Position Guides apparently prepared in 1982 and in effect at the start of the license term; see NAACP Ex. 36, p. 1), NAACP Ex. 36 (Position Guides included in from KFUO's February 1, 1984 revision of its Administration Manual; see id., p. 1); NAACP Ex. 37 (an April 10, 1986 Memorandum from Daryl H. Haake to The Board of Directors concerning "Detailed job description of Business Manager"); NAACP Ex. 39 (Duty Descriptions, each dated October, 1986); NAACP Ex. 40 (Duty Descriptions; pp. 1-2 and 23-24 are dated March, 1987, pp. 3-9 are dated April, 1987, pp. 10-18 are dated June, 1987, pp. 19-20 are dated September, 1987, and pp. 21-22 are dated December, 1985) and NAACP Ex. 41 (Position Descriptions; pp. 1-15 are dated June, 1989 and pp. 16-17 are dated July, 1989). The documents in NAACP Exs. 35 and 36 delineate job duties but not job qualifications. The other documents delineate both duties and qualifications.

68. Job qualifications are identified as "essential" or "desirable" in these documents. According to Devantier, "essential qualifications are those without which an individual would...have considerable difficulty performing the task. [A] [d]esirable qualification is a trait, characteristic, experience, whatever it may be that would enhance the individual's ability to perform the task." Tr. 872.

69. For various positions, Table 4 sets out:

- whether the job duties expressly refer to on-air announcing or assisting on-air AM announcers (e.g. as a producer) ("Religious Duties")
- whether the job duties expressly refer to classical music (e.g. for announcing or cataloguing the music ("Classical Duties"))
- the exact language used to delineate religious or classical music related job qualifications.

TABLE 4

KFUD JOB DUTIES AND PROFESSED JOB QUALIFICATIONS

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
FM General Manager	NAACP #40, pp. 7-9 (4/87)	No mention of Religious Duties or Classical Duties.	"Other desirable: An active member of a Christian Congregation."
	NAACP #41, pp. 1-3 (6/89)	Religious Duties Required ("Oversee compliance with the stated religious programming objectives and standards of the BCS.")	"Essential: Understanding and support of the purposes, constitution, by-laws, policies and beliefs of The Lutheran Church/Missouri Synod.... Other Desirable: Knowledge of classical music/fine arts radio; Member of a Lutheran Church/Missouri Synod Congregation."
Business Manager	NAACP #35, p. 1 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #37, pp. 1-4 (4/10/86)	No mention of Religious Duties or Classical Duties.	"Other desirable: Familiarity with all areas of the Synod, its structure and organization."
	NAACP #39, pp. 12-13 (10/86)	No mention of Religious Duties or Classical Duties.	Essential: An active member of a Christian Congregation, able to understand and demonstrate support for the purposes of The Lutheran Church/Missouri Synod.... Other Desirable: A Working Knowledge of the Synod."

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
Manager, Business Services	NAACP #35 pp. 23-24 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, pp. 14-15 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
Manager, FM Business Affairs	NAACP #40, pp. 1-2 (3/87)	No mention of Religious Duties or Classical Duties.	"Essential: A working knowledge of the Synod.... Desirable: An active member of a Christian Congregation, able to understand and demonstrate support for the purposes of the Lutheran Church/ Missouri Synod."
Manager, Admin. Services	NAACP #35, p. 18 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 3 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
AM Director of Admin.	NAACP #39, pp. 5-6 (10/86)	No mention of Religious Duties or Classical Duties.	"Essential: a working knowledge of the Synod....Other Desirable: An active member of a Christian Congregation, able to understand and demonstrate support for the purposes of the Lutheran Church/ Missouri Synod."

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
Admin. Assistant (Admin. Services)	NAACP #35, p. 19 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 4 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
Assistant to the Business Manager	NAACP #35, p. 2 (1982)	No mention of Religious Duties or Classical Duties.	N/A
Audio Resource Services Assistant	NAACP #40, pp. 19-20 (9/87)	No mention of Religious Duties or Classical Duties.	"Essential: An active member of a Lutheran Church/Missouri Synod congregation. Other Desirable: A working knowledge of the Lutheran Church/Missouri Synod."
Secretary (Development and P.R.)	NAACP #35, p. 17 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 2 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
AM Secretary	NAACP #41, pp. 16-17 (7/89)	No mention of Religious Duties or Classical Duties.	"Other desirable: 1. An active member of a Lutheran Church/Missouri Synod congregation. 2. A working knowledge of The Lutheran Church/Missouri Synod."

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
FM Secretary	NAACP #39, pp. 1-2 (10/86)	No mention of Religious Duties or Classical Duties.	"Other desirable: 1. A working knowledge of The Lutheran Church/Missouri Synod; 2. An active member of a Christian Congregation, able to understand and demonstrate support for the purposes of The Lutheran Church/Missouri Synod."
Secretary to FM Program Director	NAACP #41, pp. 9-10 (6/89)	No mention of Religious Duties or Classical Duties.	"Other desirable: 1. A working knowledge of the Lutheran Church/Missouri Synod. 2. An active member of a Christian congregation, able to understand and demonstrate support for the purpose of The Lutheran Church/Missouri Synod."
Secretary, to Exec. Dir. of Communications	NAACP #40, pp. 21-22 (12/85)	No mention of Religious Duties or Classical Duties.	"Other desirable: Member of a Congregation of The Lutheran Church/Missouri Synod."
Secretary, to Exec. Staff	NAACP #40, pp. 23-24 (3/87)	No mention of Religious Duties or Classical Duties.	"Other desirable: Member of a Congregation of The Lutheran Church/Missouri Synod."
Steno-Clerk (Business Manager)	NAACP #35, p. 3 (1982)	No mention of Religious Duties or Classical Duties.	N/A

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
Steno-Clerk (Admin. Services)	NAACP #35, p. 20 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 5 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
Receptionist (Business Manager)	NAACP #35, p. 4 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #39, pp. 7-8 (10/86)	No mention of Religious Duties or Classical Duties.	"Essential: A working knowledge of the Synod."
Receptionist (Business Services)	NAACP #35 p. 25 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 16 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
FM Program Director	NAACP 35, pp. 8-9 (1982)	Classical Duties Required. No mention of Religious Duties.	N/A
	NAACP #36, pp. 8-9 (2/1/84)	Classical Duties Required. No mention of Religious Duties.	N/A
	NAACP #39, pp. 16-18 (10/86)	Classical Duties Required. No mention of Religious Duties.	"Essential: An active member of a Christian Congregation, able to understand and demonstrate support for the purposes of The Lutheran Church/ Missouri Synod."
	NAACP #41, pp. 7-8 (6/89)	Religious and Classical Duties Required.	"Essential: Extensive knowledge of the classical music repertoire.... Other Desirable: Member of a Lutheran Church/Missouri Synod Congregation."

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
FM Announcer/ Programmer	NAACP #35, p. 10 (1982)	Classical Duties Required. No mention of Religious Duties.	N/A
	NAACP #36, p. 10 (2/1/84)	Classical Duties Required. No mention of Religious Duties.	N/A
	NAACP #40, pp. 3-6 (4/87)	Classical Duties Required. No mention of Religious Duties.	"Other desirable: an active member of a Christian Congregation, able to understand and demonstrate support for the purposes of the Lutheran Church/ Missouri Synod."
FM Librarian, Announcer/ Programmer	NAACP #39, pp. 3-4 (10/86)	Classical Duties Required. No mention of Religious Duties.	"Other desirable: 1. A working knowledge of The Lutheran Church/ Missouri Synod."
FM Manager of Production and Traffic	NAACP #35, pp. 11-12 (1982)	Classical Duties Required. No mention of Religious Duties.	N/A
	NAACP #36, pp. 11-12 (2/1/84)	Classical Duties Required. No mention of Religious Duties,	N/A
Production Operator (parttime)	NAACP #35, p. 13 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 13 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A

TABLE 4 (continued)

<u>Position</u>	<u>Source and Date</u>	<u>Duties</u>	<u>Qualifications</u>
Chief Engineer	NAACP #35, pp. 14-15 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, pp. 17-18 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #39, pp. 9-11 (10/86)	No mention of Religious Duties or Classical Duties.	"Other desirable: an active member of a Lutheran Church/ Missouri Synod Congregation."
	NAACP #40, pp. 14-16 (6/87)	No mention of Religious Duties or Classical Duties.	"Other desirable: 1. An active member of a Christian Congregation. 2. Knowledge of and appreciation for classical music."
Engineer	NAACP #35, p. 16 (1982)	No mention of Religious Duties or Classical Duties.	N/A
	NAACP #36, p. 19 (2/1/84)	No mention of Religious Duties or Classical Duties.	N/A

70. Stortz' direct case testimony asserted that "many positions required a knowledge of Synod doctrine and philosophies." As examples, Stortz cited the Manager of KFUE(AM), the Director of Development, and announcers of religious programming. KFUE Ex. 4, pp. 7-8.

71. Stortz testified that some, but not all secretaries "interact on a daily basis with pastors within the Lutheran Church and schedule them to be speakers, schedule them to what they're going to speak about." Tr. 495.

72. Stortz also maintained that "certain secretaries" needed to be "familiar with the Lutheran Church" because part of their job was to contact pastors to enlist volunteers for 'Share-A-Thons.'" KFUE Ex. 4, p. 7. A "Share-a-Thon" is a fund-raising event. Tr. 488 (Testimony of Dennis Stortz). Stortz testified that "it's very unusual for Lutherans that...support the radio station to want to talk to and give money to people they feel uncomfortable with, non-Lutherans." Tr. 500. However, he acknowledged that a caller wishing to give money would not necessarily know if the person answering the phone were a Lutheran." Id. KFUE did not offer evidence to show that telephoning a pastor with a request that he help raise money requires special knowledge of any particular theological teaching.

73. Stortz also maintained that "Church membership was considered desirable for any receptionist" because "the receptionists needed to interface with religious listeners and potential donors." KFUO Ex. 4, p. 8; see also Tr. 495-96; 734. Yet Stortz could identify only one piece of religious information with which a receptionist would need to be familiar: the Church calendar, which identifies, for example, the dates of Pentecost Sunday and Trinity Sunday. Tr. 735-36.

74. KFUO did not attempt to show that the "interfaces" with "religious listeners and potential donors" required knowledge of religious teachings or the structure of the Lutheran Church, and could not, in any event, be learned quickly on the job. For example, KFUO did not state that a receptionist conducts prayer, assists with programming, engages in religious discussions with callers, or does anything other than what a receptionist typically does -- take messages and refer callers and visitors to the proper place. KFUO did not suggest that a reasonably intelligent person could not learn where to refer any particular type of caller. Under crossexamination, Stortz acknowledged that a person not familiar with the Lutheran Church could be trained to perform the Stations' secretarial or receptionist duties. Tr. 499-500.

75. The receptionist positions' job descriptions do not mention the theological duties imputed to the position by Stortz. These are the Receptionist (Business Manager) and the Receptionist (Business Services). See Table 4 supra.

76. Stortz testified that familiarity with or membership in the Church would be "desirable" even for engineers, because "the engineers go out to churches and do all the remote set-up of church services. They interact with the pastors at the church and schedule when things are going to happen and how they're going to happen and discuss the engineering technical venue of the operation so that the pastor knows what's going on." Tr. 501. However, he could not identify any non-engineering related tasks performed by engineers which involve interacting with pastors. Id.; Tr. 743.

77. Stortz also maintained that KFUD "believed it was essential or highly desirable for announcers and salespersons for the FM station to be knowledgeable about classical music." KFUD Ex. 4, p. 9.

78. Stortz testified that it would be "desirable", albeit not "absolutely necessary" for the Stations' business manager to have Lutheran training or be a member of a Lutheran congregation because he or she "interacted on a daily basis with the...Lutheran Church headquarters." Tr. 744.

79. Stortz admitted that it should not be necessary for a janitor to be familiar with the Lutheran Church, but said "it wouldn't hurt....it would be a desirable attribute....[i]t would be minor consideration." Tr. 502.

80. KFUEO presented no testimony or other evidence justifying the religious requirements for some of the FM jobs shown in Table 4 supra. KFUEO's list of persons hired during the license term identifies Frank Wood as a sales worker hired June 19, 1989. His referral source is given as "Resume on File (Mr. Wood was a dedicated Christian, and wanted to work at a Christian radio station.)" KFUEO Ex. 4, Tab 6, p. 6. KFUEO has not suggested that religious knowledge or training is a skill somehow related to any FM function.

81. As shown in Table 4, several FM positions carried classical music knowledge prerequisites. Stortz maintained that "the need for classical music knowledge for various jobs did not in any way affect our willingness to recruit individuals of any race, color or creed....to the best of my knowledge, no minority applicant was ever rejected for any position at KFUEO-FM because he or she lacked knowledge of classical music." KFUEO Ex. 4, p. 10.

82. However, neither religious nor classical requirements ever had to be invoked for the awkward task of rejecting plainly qualified African American job applicants. Instead, KFUEO employed elaborate procedures to insure that no African Americans would ever apply for a nonsecretarial job. Through the Concordia arrangement and the almost exclusive use of in-house postings and word of mouth recruitment (discussed herein), KFUEO guaranteed that African Americans had no way to learn of job openings.

83. Justifying this scheme to the FCC proved to be an embarrassing and daunting task. It fell to Marcia Cranberg, an attorney at Arnold and Porter. Cranberg is Special Counsel employed by Arnold and Porter. She joined the firm in 1982 as an Associate and has been with the firm since. KFUE Ex. 8, p. 1. She has been primarily responsible for handling KFUE's account with the firm since 1987 or 1988. Tr. 998-99.

84. The senior partner handling KFUE's account was Reed Miller, whose deposition is in evidence as Joint Ex. 2. According to Reed Miller, Arnold & Porter had represented KFUE since 1963. Id., p. 6. Reed Miller started with Arnold & Porter in 1945 and became semi-retired in 1983. Id., p. 5, 6. He recalled that Cranberg assumed primary day to day responsibility for the KFUE account around 1985, although he did not entirely leave the account to her. Id., p. 8; but see 182 supra.

85. Reed Miller's contacts with KFUE on EEO matters during the license term were all with Stortz. He had no such contacts with Bohlmann or Devantier. Id., pp. 11-12.

86. After reviewing the draft 1989 renewal applications sent her by Stortz, Cranberg filed them on September 29, 1989. KFUE Ex. 8, p. 5. After obtaining the NAACP's Petition to Deny and consulting with Stortz, she filed KFUE's Opposition pleading on February 23, 1989. Id., p. 6. The arguments in the Opposition had also been approved by Reed Miller. Joint Ex. 2, p. 32.

87. The Opposition stated:

Given the specialized nature of KFUE's formats, nearly all of the positions within KFUE's top four job categories can only be filled by persons who have either expertise in classical music (for KFUE-FM) or theological training in the doctrine of the Lutheran Church (for KFUE-AM).

KFUE Ex. 4, Tab 7, p. 13.

88. The Opposition maintained that in 1986, four of six management positions "required either expertise in classical music or theological training," and six of the seven professional positions "required either expertise in classical music or theological training." KFUE Ex. 4, Tab 7, p. 13. The Opposition asserted that the only top four category positions not requiring "religious or musical training" are Chief Engineer, Technician, and Business Director. Id., n. 3.

89. The Opposition further maintained that in 1987, one new professional job required theological training and one new sales job required "a working knowledge of classical music." KFUE Ex. 4, Tab 7, p. 14.

90. The Opposition further maintained that in 1988, a new professional position at each station and a new sales position at the FM station "religious training or classical music expertise were [sic] required for each respective new position." Id.

91. The Opposition further maintained that in 1989, two new sales positions and a new professional position were added at the FM station, all of which "required expertise in classical music." Id.

92. A reading of these representations compels the conclusion that KFUD wanted the Commission to believe that the only top-four category positions for which it did not require classical or theological backgrounds were Chief Engineer, Technician and Business Director [Business Manager]. However, as shown in Table 4 supra, only the Technician [Engineer] position did not carry such a requirement.

93. Furthermore, at least seven lower five category positions did carry a theological a requirement, a fact omitted in the Opposition. These were the Audio Resource Services Assistant, the AM Secretary, the FM Secretary, the Secretary to the Program Director, the Secretary to the Executive Director of Communications, the Secretary to the Executive Staff, and the Receptionist (Business Manager). See Table 4 supra. Furthermore, not one of these positions' job descriptions contained any mention of religious-related duties. Id.

94. Moreover, for eleven top four category positions which the Opposition manifested as carrying such a requirement, and which did carry the requirement in KFUD's internal documents, KFUD's job descriptions said nothing of theological job responsibilities. These were the Manager of Business Services, the Manager of FM Business Affairs, the Manager of Administrative Services, the AM Director of Administration, the Administrative Assistant (Administrative Services), the Assistant to the Business Manager, the FM Program Director (until June, 1989), FM Announcer/Programmer, FM Librarian, Announcer/Programmer, FM Manager of Production and Traffic, and FM Production Operator (Parttime). See Table 4 supra.

95. The Opposition maintained that relatively few Lutherans are African Americans.^{17/} The Opposition cited African American enrollment in Concordia Seminary in order to estimate the proportion of African Americans with "a Lutheran theological background." KFUE Ex. 4, Tab 7, pp. 14-15.

96. As noted above, that enrollment was given as three African Americans out of 482 students. Id., p. 15. KFUE did not introduce evidence to show that Concordia Seminary does not discriminate against African Americans or why the representation of African Americans at the Seminary is so much lower than the over 9% cumulative African American representation at the Synod's twelve colleges and seminaries (See KFUE Ex. 2, p. 2 (Testimony of Rev. Bryant Clancy)) and even lower than the percentage of Lutherans who are African Americans (1.92%; Id., p. 1; or 3%, according to the Synod's Research and Development Department; see n. 7 supra). Nor did KFUE explain how so low an African American enrollment level can be said to embody the proportional availability of African Americans suitable for employment at the Stations.

^{17/} The Opposition asserted that five percent of Lutherans in the St. Louis metropolitan area are minorities, and three percent of Lutherans in the United States are African American. The source given was the Research and Development Department of the Synod. KFUE Ex. 4, Tab 7, p. 14.

97. KFUE's Opposition to the Petition to Deny maintained that "KFUE is not aware of any specific statistics showing classical music training among members of minority groups. However, one measure is the popularity of KFUE-FM (the only full-time classical music station in the area) among persons who are members of minority groups." KFUE Ex. 4, Tab 7, p. 10. The Opposition gave this figure as 3.7% of the station's listeners, with The Media Audit -- St. Louis, 1988 (International Demographics, Inc.) as the source.

98. KFUE made no effort to show that one had to be a listener to KFUE-FM to be presumed to have a classical music background, or that such listenership was required of White job applicants or even inquired into during their interviews. Nor did KFUE make any effort to show that it carried programs requested by African Americans interested in classical music, promoted itself in the African American community. KFUE did not even take the obvious step (assuming it ever happened) of showing that it sent anyone to speak to music students in St. Louis' predominately African American public schools.

99. In other predesignation filings following the Opposition, KFUE attempted to back away from its earlier argument that virtually all jobs required classical or theological backgrounds. In its September 21, 1992 "Motion to Strike and Reply to Comments", KFUE stated:

Because so many of its employees must possess either training in Lutheran theology or a classical music background, the actual availability of minorities in St. Louis with the requisite job skills is by definition far lower than the number of minorities overall in the St. Louis labor force, and KFUE's performance must be judged in that context.

In its Opposition to Petition to Deny, KFUD explained that assessing KFUD's performance against general labor market minority availability statistics is misleading because this fails to account for the fact that nearly all of the full-time hiring opportunities which occurred at the stations during the license term required particular training either in classical music or Lutheran theology [fn. omitted]. Because of the self-evident proposition that there are fewer minorities in St. Louis with these special skills than there are minorities in St. Louis as a whole, KFUD suggested that it was inappropriate to assess its employment performance in light of census data for the entire minority population. [fn. omitted; emphasis supplied].

MMB Ex. 11, pp. 11, 16-17. However, it is elementary that a head count of the number of people in the population is not the statistical reference point for minority availability for employment. The relevant inquiry, obviously, is on the percentage of minorities in the population. See FCC Form 396 (version in effect through 9/30/90), Filing Instructions, KFUD Ex. 4, Tab 16, p. 2. Consequently, it could not logically follow from this "self evident proposition" that it was appropriate to have argued that there were proportionately fewer minorities than Whites with these "special skills."